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Supreme Court of the United States.

No. 8 ORIGINAL.
DECIDED OCTOBER TERM, 1903.

SOUTH DAKOTA,
Plaintiff,

against

NORTH CAROLINA,
Defendant.

PETITION FOR REHEARING.

J. G. CARLISLE,
Attorney for Petitioner.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States.

SOUTH DAKOTA, Plaintiff, AGAINST NORTH CAROLINA, Defendant.	No. 8 Original. Decided October Term, 1903.

PETITION FOR REHEARING.

On this application for a rehearing, we respectfully submit that whatever may be the rule in ordinary cases of a foreclosure by the holders of a second mortgage, the facts disclosed in this record show conclusively that the first mortgage bondholders are necessary parties to any action prosecuted for the foreclosure of the mortgage on the stock in controversy, for the reason that neither the decree which the Court has ordered to be entered, nor any other decree which the Court has the power to enter, can be executed without injuriously affecting the substantial rights of that class of creditors. In order to present the question fairly to the Court, it is necessary to show what are the relations of the three classes of bondholders to the subject matter of the suit and to the State of North Carolina.

Classified according to the character of the securities held there are:

I.—The holders of the bonds issued under the act to incorporate the North Carolina Railroad Company, ratified January 27, 1849, the 41st section of which provided:

> That as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and in addition thereto all the stock held by the State in "the North Carolina Railroad Company," hereby created, shall be, and the same is hereby, pledged for that purpose; and any dividends of profit which may, from time to time, be declared on the stock held by the State as aforesaid shall be applied to the payment of the interest accruing on said certificates; but until such dividends of profit may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed to pay all such interest as the same may accrue out of any moneys in the treasury not otherwise appropriated.

II.—The holders of the bonds issued under the act for the completion of the North Carolina Railroad Company, ratified February 14, 1855, under which the State made a subscription of $1,000,000 to the six per cent. preferred capital stock of that company and authorized the issue of bonds for that amount with the same pledges and securities on the preferred stock as were given in in relation to the common stock for the payment

of the bonds issued under the original act of incorporation. The first and second sections of the act are as follows:

> "SEC. 1. Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same, That the public treasurer is authorized and instructed, to subscribe in behalf of the State, for ten thousand additional shares of the capital stock in the North Carolina Railroad Company, and that he make payments for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions, prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized, that were given for those issued under the direction of said act: Provided, nevertheless, that the whole amount of principal money of such bonds or certificates of debt, shall not exceed the sum of one million of dollars.
>
> SEC. 2. Be it further enacted, That the stock thus directed to be subscribed and paid for in behalf of the State, shall be a preferred stock in the North Carolina Railroad Company, and the stock shall be entitled to six per cent. per annum, payable semi-annually thereon out of any dividends of profits made by said company, before any dividends shall be paid on any other stock in the same; and that the stockholders of said company, in general meeting assembled, shall give their assent to the provisions of this act; and that the president of said company shall make a

> certificate of said assent, under the seal of the said company, to be approved by the governor of the State, and filed in the office of the public treasurer, before the subscription shall be made as directed in the first section of this act: Provided, that said stock of one million shall continue to be preferred stock, entitled as aforesaid, only so long as, and during the time that it is held by the State; but upon being sold and transferred by the State, shall thenceforth cease to be entitled to dividends of preference as aforesaid: Provided further, that said stock may be transferred to any other work of internal improvements, by a future legislature."

III.—The holders of the bonds issued after the passage of the act enhance the value of the bonds to be issued for the completion of the Western North Carolina Railroad ratified September 18, 1866, the first section of which provides:

> "That the public treasurer be and he is hereby authorized and directed, whenever it shall become his duty under the provisions of said acts, passed at the sessions of 1854–'55 and 1860–'61, to issue bonds of the State to the amount of fifty thousand dollars, or more, to mortgage an equal amount of the stock which the State now holds in the North Carolina Railroad, as collateral security for the payment of said bonds, and to execute and deliver, with each several bond a deed of mortgage for an equal amount of stock *to* (of) said North Carolina Railroad, said Mortgage to be signed by the treasurer and countersigned by the comptroller, to constitute a part of said bond, and to be transferable in like manner with it, as provided in the charter

> of said Western North Carolina Railroad Company; and further, that such mortgage shall have all the force and effect, in law and equity, of registered mortgages without actual registry."

On the 14th day of March, 1879, an act was passed to adjust and renew a portion of the State debt which included the bonds or certificates issued for stock in the North Carolina Railroad Company. This act provided for the issue of new bonds to be exchanged for the old ones then outstanding, and the eighth section was as follows:

> "The said new bonds and coupons shall be exempt from all taxation whatsoever, State, county and municipal, general and special, and the same shall be expressed on the face thereof; and shall in all respects stand in the place of and be entitled to the same securities as are the old bonds and coupons aforesaid, and shall have the same lien on the stock of the State in the said railroad company which the said old bonds and coupons now have; and the public treasurer shall apply the dividends received by the State on its stock in said company to the payment of the coupons on said new bonds."

The Commissioners appointed under this act entered into a contract with the holders of the bonds, in which it was stipulated that the old bonds should be surrendered and new ones received in their stead; and in the sixth clause of that contract it was provided that:

> "6. And it is understood and is hereby expressly declared to be the true intent

> and meaning of this agreement that the new bonds to be issued hereunder are given, not in payment but in renewal and extension only of the old bonds, and without prejudice to the lien of the said old bonds on the State's stock in the North Carolina Railroad Company, which lien is preserved unimpaired for the security of the new bonds as fully as the old bonds are now secured thereby."

The mortgage printed on the backs of the several bonds sued on in this action states that "ten shares of the stock in the North Carolina Railroad Company originally subscribed for by the State are hereby mortgaged as collateral security for the payment of this bond" (Record, p. 3).

The foregoing extracts from the statutes, contract of adjustment and endorsement on the bonds sued on show, (1) that the holders of the bonds issued under the Act of 1849 and extended under the Act of 1879 have a first mortgage lien on the common stock and that the statute which constitutes the contract between the State and the purchasers and subsequent holders of the bonds provides, that the dividends on the stock "shall be applied to the payment of the interest accruing on said bonds;" (2) that the holders of the bonds issued under the Act of 1855 have the first and only mortgage lien on the six per cent. preferred stock and are entitled to have the dividends earned on that stock applied to the payment of accrued interest, for an act under which they purchase declares: "that the same pledges and securities are hereby given for the faithful

payment and redemption of the certificate of debts now authorized that were given for those given under the direction of said act "—that is, under the Act of 1849; and (3) that the holders of the original bonds issued under the Act of 1866, the plaintiff, being one, have a second mortgage on the common stock "originally subscribed for by the State" under the Act of 1849, but no mortgage on the preferred stock and no contract providing for the application of dividends to the payment of interest.

The clear purpose of this Legislation was to pledge the dividends on the North Carolina Railroad stock only to the holders of bonds issued to pay for subscriptions to that stock, and not to pledge the dividends on such stock to the holders of bonds issued to pay for stock in the Western North Carolina Railroad Company, to which class the plaintiff in this action belongs. The decree in this case, however, treats the bonds issued under the acts of 1849 and 1855 as belonging to the same class and as having the same security, and the plaintiff claims a second mortgage on one hundred shares of stock, being part of thirty thousand shares, without discriminating between the twenty thousand shares of common and the ten thousand shares of preferred (Record, pp. 3 and 8).

Rothschild was named as a defendant to represent part of the first mortgage bondholders upon the allegation that he was "one of the holders," but whether he held bonds secured by a lien on the common stock or on the preferred is not

stated. In his testimony, however, he shows that he owned none of the first mortgage bonds of either class, but held some bonds of the same class as those sued on (Rec. 54).

All that is said in the opinion on the subject of parties will be found on pages 112 and 113 of the official report (192 U. S.), and a reference to it will show that the right of holders of the first mortgage bonds to be heard was not discussed. The two classes of first mortgage bondholders and the second mortgage bondholders, although their relations to the subject matter of the suit were quite different, were grouped together in the statement of the question, and then it was said:

> "But we think that these individuals are "not necessary parties defendant, and "that no relief should be given to them or "to the classes of bondholders they repre-"sent."

Nothing more was said respecting the first mortgage bondholders; but the Court then proceeded to state the reasons why the holders of the second mortgages on separate and distinct shares of stock, not embraced in the plaintiff's lien, were not necessary parties. We do not claim that either the holders of the first or second mortgages could have any relief in this proceeding. This Court could not constitutionally grant them any relief against the State of North Carolina, nor could it properly grant relief to the plaintiff unless it could be done without injury to the

rights of others who are interested in the subject matter of the action, and who were not parties.

The question therefore is not whether relief can be given to the first mortgage bondholders, but whether they are interested in the subject matter of the action; and if so, whether the decree now ordered, or any other decree that this Court has jurisdiction to make, will or will not injuriously affect them.

In concluding its opinion the Court says:

> "Equity is satisfied by a decree for a "foreclosure and sale of the mortgaged "property, leaving the question of a judg- "ment over for any deficiency, to be "determined when, if ever, it arises. And "surely if, as we have often held, this "Court has jurisdiction of an action by "one State against another to recover a "tract of land, there would seem to be no "doubt of the jurisdiction of one to en- "force the delivery of personal property.
>
> "A decree will, therefore, be entered, "which, after finding the amount due on "the bonds and coupons in suit to "be twenty-seven thousand four hundred "dollars ($27,400), (no interest being re- "coverable, United States *v.* North Caro- "lina, 136 U. S., 211), and that the same are "secured by one hundred shares of the "stock of the North Carolina Railroad "Company, belonging to the State of "North Carolina, shall order that the said "State of North Carolina pay said amount "with costs of suit to the State of South "Dakota on or before the 1st Monday of "January, 1905, and that in default of such "payment an order of sale be issued to "the Marshall of this court, directing him "to sell at public auction all the interest of

> " the State of North Carolina in and to one
> " hundred shares of the capital stock of
> " the North Carolina Railroad Company,
> " such sale to be made at the east front
> " door of the Capitol Building in this city,
> " public notice to be given of such sale by
> " advertisements once a week for six weeks
> " in some daily paper published in the City
> " of Raleigh, North Carolina, and also in
> " some daily paper published in the City of
> " Washington."

The first question which presents itself on reading this order of the Court is, what stock will the Marshall sell? The order for the decree treats the matter in the same way as it was treated in the bill, by designating the thing to be sold merely as "all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company." This, however, if an error or oversight, can be corrected before the sale, and we call attention to it only to secure the correction in case this application for a rehearing is denied.

It is found by the Court that there has been no formal issue of stock certificates to the State (Rec., p. 309). The railroad company, which is the only authority that can issue certificates, is not a party to this action, and therefore no coercive process can be issued against it; but all the interest of the State of North Carolina must be sold, and the purchaser, we presume, armed with a title acquired under the decree of this Court, can, by appropriate proceedings in another tribunal, compel the company to issue the certificates to him;

or he can, at the very least, compel it to recognize him as a stockholder, entitled to vote at stockholders' meetings and receive dividends on his stock.

The Court says in its opinion:

> "The purchaser at the sale duly au-
> " thorized by this decree will become vested
> " with the full title of the State to the
> " number of shares of stock stated in the
> " mortgage. He will occupy the same
> " position in relation to the corporate prop-
> " erty that other stockholders occupy and
> " have whatever rights they have."

We are unable to see how such a situation can be established and maintained consistently with the rights of holders of bonds issued under the Act of 1849. They have not only a mortgage lien upon the stock representing an interest in all the corporate property, but they have under the statutes and contracts a legal and equitable right to have the dividends applied to the payment of interest as it accrues. Long before the bonds sued on were issued and sold the State of North Carolina for a full consideration had agreed to make this application of the dividends, and the bonds were sold largely upon the faith of that pledge; but now it is insisted in a judicial proceeding, to which those bondholders are not and cannot be parties, that the State of North Carolina can be deprived of the power to comply with its contract, and that the ownership and control of the stock which, of course, includes the right to receive the dividends, can be transferred to a

purchaser at a sale made for the sole benefit of a party who holds a second mortgage on the stock only, with no pledge of the dividends.

While it may be that the dividends have been at times sufficient to pay the interest on both classes of bonds and that if a court could be found with jurisdiction over all necessary parties, the holder of the second mortgage bonds might have a decree directing the surplus to be paid on his claim; but no such decree could be made in this court. In such a proceeding, the State, the first mortgage bondholders and the railroad company, which under its charter declares and pays dividends to its stockholders only, would have to be made parties, and the Court after ascertaining the relative rights of all the parties would have to determine the amount to be paid to each class of creditors. This Court has decided in the present case that all it can do in reference to the second mortgage is to order a sale of all the interest in the stock and when this is done, the purchaser will be the owner of it and the railroad company will pay him all the dividends, not merely the surplus after paying the State sufficient to discharge the interest on the first mortgage bonds. The Court can make no order of apportionment or distribution of the dividends; it must either order the sale of the stock to a purchaser who will become a stockholder and as such be entitled to all the dividends declared upon it, or it must dismiss the bill for want of jurisdiction to grant relief to the plaintiff.

This Court has frequently had occasion to decide under what circumstances relief could be given to the plaintiff in an equity case when persons having an interest in the subject matter of the action were not parties, and as most of the decisions upon the question are cited and approved in California *v.* Southern Pacific Company, 157 U. S., 229, we refer to that case for a comprehensive statement of the rules upon the subject.

In the case referred to, it is stated in the syllabus, as one of the points decided, that "When "an original case is pending in this court, to be "disposed of here in the first instance and in the "exercise of an exceptional jurisdiction, it does "not comport with the gravity and the finality "which should characterize such an adjudication, "to proceed in the absence of parties whose rights "would be in effect determined, even though "they might not be technically bound in subse-"quent litigations in some other tribunal."

In the opinion, after citing a number of decisions, the Court said: "Sitting as a court of equity "we cannot, in the light of these well-settled prin-"ciples, escape the consideration of the question "whether other persons who have an immediate "interest in resisting the demand of complainant "are not indispensable parties or, at least, so far "necessary that the cause should not go on in "their absence. Can the Court proceed to a de-"cree as between the State and the Southern "Pacific Company, and do complete and final

" justice, without affecting other persons not be-
" fore the Court, or leaving the controversy in
" such a condition that its final termination might
" be wholly inconsistent with equity and good
" conscience?" And further on it said: " Irre-
" spective, then, of the extent, technically speak-
" ing, of the effect and operation of a decree as to
" the seven parcels, based on that ground, as *res*
" *adjudicata*, it is impossible to ignore the inquiry
" whether the interests of persons not before the
" Court would be so affected and the controversy
" so left open to future litigation as would be in-
" consistent with equity and good conscience."

It is clear that, although the State of North Carolina may be at all times willing to apply the dividends upon the 100 shares of stock, which is to be sold in this action, to the payment of the interest, as it accrues on the first mortgage bonds, no such application can be made without litigation between the bondholders and the purchasers of the stock. The present litigation therefore, while it would transfer ownership and possession of the stock with the right to receive dividends upon it to a third person, will leave the rights of interested parties undetermined, and this a court of equity will not do, except perhaps under very extraordinary circumstances.

A rehearing is respectfully asked.

J. G. CARLISLE,
Attorney for Petitioner.

FILE COPY.

In the Supreme Court of the United States.

No. 8 ORIGINAL—OCTOBER TERM, 1904

Office Supreme Court U
FILED
DEC 5 1904
JAMES H. McKENNEY,
Clerk

THE STATE OF SOUTH DAKOTA

vs.

THE STATE OF NORTH CAROLINA et al.

This is a motion made by counsel for the State of North Carolina, asking for a modification of the decree entered in the above entitled suit at October Term, 1903, of this Court.

The following is a copy of the notice issued in the matter of this motion, service of which has been accepted by counsel for the State of South Dakota:

"IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF SOUTH DAKOTA, *Complainant,*
vs.
THE STATE OF NORTH CAROLINA. } No. 9 (8) Original.

To MR. WHEELER H. PECKHAM, *Counsel for the State of South Dakota:*

You will take notice that the undersigned, of counsel for the State of North Carolina, will move in the Supreme Court of the United States, in the above entitled cause, on the first Monday in December, 1904, at 12 o'clock, noon, or as soon thereafter as counsel can be heard, for an order modifying the judgment and decree hereinbefore entered in the said cause, so as to fix the first day of April, 1905, as the date on or before which the State of North Carolina shall pay to the State of South Dakota the sum named in the said judgment and decree, instead of on or before the date named by the Court, to-wit: January 1, 1905.

This the 21st day of November, 1904.

ROBERT D. GILMER,
Attorney-General of North Carolina,
Of Counsel for the State of North Carolina."

On the said notice the following endorsement appears: "Received copy within notice November 23, 1904.

WHEELER H. PECKHAM,
Of Counsel for State of South Dakota."

At the said October Term, 1903, of this Court a decree was entered in the said cause, finding the amount due on the bonds and coupons in suit to be $27,400, and directing that the State of North Carolina should pay to the State of South Dakota the said amount, with costs of said suit, on or before the first Monday of January, 1905. And in default of such payment the Marshal of this Court was directed "to sell at public auction all the interest of the State of North Carolina in and to one hundred shares of the capital stock of the North Carolina Railroad Company."

Counsel for the State of North Carolina represents to this honorable Court that the General Assembly of the said State will meet in biennial session on the first Wednesday after the first Monday in January, 1905. The question of the payment of this judgment will be submitted to that body by His Excellency, the Governor of North Carolina. In order that action may be taken in the premises before the time fixed for the advertisement of the sale of the State's interest in certain securities mentioned in the said decree, this Court is respectfully asked to modify the said judgment and decree so as to postpone the date fixed for the payment of said amount to the first day of April, 1905.

ROBERT D. GILMER,
Attorney-General of North Carolina,
Of Counsel for State of North Carolina.